No. 93-1631

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY, *et al.*,
Petitioners,
v.
COORS BREWING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether section 5(e)(2) of the Federal Alcohol Administration Act, 27 U.S.C. § 205(e)(2), violates the First Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. To protect their citizens from the harms

caused by the sale and use of alcoholic beverages, the States have long exercised "something more than the normal state authority over public health, welfare, and morals." *California v. LaRue*, 409 U.S. 109, 114 (1972). Indeed, the States have exercised these powers since before the ratification of the Twenty-first Amendment. *See, e.g., Mugler v. Kansas*, 123 U.S. 623 (1887); *The License Cases*, 46 U.S. (5 How.) 504 (1847).

The misuse of alcohol remains a serious societal problem. Statistics for the year 1991 show that approximately twenty thousand traffic fatalities occurred in accidents in which a driver had ingested alcohol. U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1992* 355 (Table 3.119). Moreover, there were 3,176,004 arrests for alcohol related offenses, including 1,372,266 for driving under the influence. *Id.* at 457 (Table 4.29).

The States' interests in regulating the sale and use of alcoholic beverages and promoting temperance are plainly substantial. The maintenance of their authority to decide whether the labeling of alcohol content on malt beverages should be required or prohibited is a core concern of the States. Thus, while this case involves a challenge to a federal statute, an affirmance of the court of appeals' decision will undoubtedly prompt challenges to the numerous state laws which prohibit the labeling of alcohol content.

Amici have a manifest interest in the legal standard adopted by the Court and in ensuring that any opinion recognizes the broad powers of the States under the Twenty-first Amendment. Accordingly, *amici*

submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

1. The court of appeals' holding—that past evidence of strength wars (*i.e.*, competition by brewers for market share by increasing the alcohol content of their products) is insufficient to show that section 205(e)(2)'s alcohol content labeling prohibition "directly advances" the government's concededly substantial interest in preventing strength wars—is flawed in several respects. First, it is inconsistent with the Court's recognition that a legislature can rely on the experiences of other jurisdictions in deciding to regulate. *See City of Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 50-52 (1986). It thus calls into question the authority of the States to rely on the evidence gathered by Congress in enacting section 205(e)(2) as justification for their own labeling prohibitions.

Moreover, the court of appeals' suggestion that past experience can no longer support the labeling prohibition amounts to nothing more than judges substituting their policy preferences for those of the legislature. It is the legislatures, not courts, which possess the institutional competence to assess the need to regulate the market.

Even if it is true, as the court of appeals concluded, that "brewers in the United States have no intention of increasing alcohol strength, regardless of labeling regulations, because the vast majority of consumers

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

. . . value taste and lower calories—both of which are adversely affected by increasing alcohol strength," Pet. App. 8a, consumer preferences can, and do, change. Likewise, brewers' "intentions" are hardly cast in stone. It defies credulity to suggest that if there was an increase in the number of drinkers who preferred higher alcohol content beers, segments of the brewing industry would not compete, as they did in the years following prohibition, for this share of the market. The potential costs of disregarding history are too great to allow courts, rather than legislatures, to serve as the proper forums for pleas that legislation no longer serves a valid and substantial governmental interest.

2. The States have a substantial interest in promoting temperance. *See North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion). Alcohol is a dangerous substance which imposes an immense toll on society. An authoritative study estimates that "in 1988 approximately 15.3 million individuals in the United States over age 18 met criteria for a . . . diagnosis of alcohol abuse or dependence or both." U.S. Department of Health and Human Services, *Eighth Special Report to the U.S. Congress on Alcohol and Health* 18 (1993). Moreover, in 1991 there were more than three million arrests for alcohol related offenses, including 1,372,266 for driving under the influence. U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1992* 457 (Table 4.29). Alcohol use is a significant factor in fatal traffic accidents; in 1991 nearly twenty thousand people lost their lives in this manner. *Id.* at 355 (Table 3.119). It is also a significant factor in accidental deaths caused by burns, falls and drownings. *Eighth Special Report*

at 237, 243. Studies have also shown alcohol use to be a significant factor in homicides and suicides. *Id.* at 234, 246.

3. As the foregoing demonstrates, the sale and use of alcoholic beverages causes substantial public harms. It was because of these public harms that the Twenty-first Amendment granted to the States broad authority to regulate the trade in alcoholic beverages. The Court has accordingly recognized that the Amendment "confer[s] something more than the normal state authority over public health, welfare, and morals." *California v. LaRue*, 409 U.S. 109, 114 (1972). And while the Amendment does not "supersede[] all other provisions of the United States Constitution in the area of liquor regulations," *id.* at 115, "[t]he States enjoy broad power under . . . the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Accordingly, state liquor control regulations "are supported by a strong presumption of validity and should not be set aside lightly." *North Dakota*, 495 U.S. at 433 (plurality opinion) (citation omitted). Consistent with this principle, the Court, in reviewing state liquor control regulations which implicate First Amendment interests, has rejected higher level scrutiny in favor of the rational basis test. *See LaRue*, 409 U.S. at 113-19.

Labeling prohibitions satisfy this standard. As the court of appeals recognized, Congress enacted section 205(e)(2) because in the aftermath of the repeal of prohibition, the brewing industry engaged in strength wars in which "producers competed for market share by putting increasing amounts of alcohol in their beer." Pet. App. 6a (citation omitted). The

record also contains evidence that manufacturers of malt liquors have competed for market share by touting the higher alcohol content of their products. *Id.* at 7a. This evidence provides a rational basis for concluding that federal and state prohibitions of statements of alcohol content on beer labels protect against the recurrence of strength wars.

4. *Amici* believe that the correct understanding of the Twenty-first Amendment is that the States were to have exclusive control over the liquor trade. *See Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 334-40 (1964) (Black, J., dissenting); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 353-60 (1987) (O'Connor, J., dissenting). This case, however, does not present an appropriate occasion to revisit the holdings in these and other cases. Accordingly, because section 205(e)(2) merely serves to assist the States in the enforcement of their respective malt beverage labeling laws, it is a permissible exercise of Congress' commerce clause powers as construed by the Court's prior decisions. *See, e.g., Hostetter*, 377 U.S. at 332. As such, section 205(e)(2) is entitled to the "added presumption" of validity afforded state regulation under the Amendment. *See LaRue*, 409 U.S. at 118-19. Because state labeling prohibitions clearly satisfy rational basis review, section 205(e)(2) is likewise constitutional.

ARGUMENT

I. THE COURT OF APPEALS IMPROPERLY DISREGARDED EVIDENCE OF THE MARKETING OF MALT BEVERAGES BASED ON ALCOHOL CONTENT

The United States has demonstrated that section 205(e)(2)'s alcohol content labeling prohibition "directly advances" the concededly substantial governmental interest in preventing strength wars. *See* Pet. Br. 25-33; *see also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). The United States has also demonstrated that the labeling prohibition is "not more extensive than necessary to serve that interest." *See* Pet. Br. 34-37; *Central Hudson*, 447 U.S. at 566. Because the United States has persuasively shown that the judgment below should be reversed, *amici* will not repeat its arguments concerning the court of appeals' misapplication of the *Central Hudson* test to section 205(e)(2). Nonetheless, because a decision by this Court to the contrary will undoubtedly prompt immediate challenges to the comparable statutes of many States, *amici* submit this brief to address other troubling features of the court of appeals' opinion, as well as the power of the States, under the Twenty-first Amendment, to prohibit statements of alcohol content on malt beverage labels.

1. Of grave concern is the court of appeals' holding that the labeling prohibition did not directly advance the government's interest given that court's own recognition that Congress enacted section 205(e)(2) on the basis of testimony "that labels displaying alcohol content resulted in a strength war wherein producers competed for market share by putting increasing amounts of alcohol in their beer," and "that

not disclosing the alcohol content on malt beverages would relieve marketplace pressures to produce beer on the basis of alcohol content, resulting over the long term in beers with a lower alcohol content." Pet. App. 6a (quoting *Coors I*, Pet. App. 17a-18a). By rejecting this evidence as insufficient to establish that the labeling prohibition "directly advances" the governmental interest in preventing strength wars, the court of appeals would apparently require each State to come forward with independent and current evidence that the "continued prohibition [of alcohol content on malt beverage labels] helps to prevent strength wars." Pet. App. 9a.

This reasoning is flawed in several respects. First, the court of appeals' rationale calls into question the authority of States to rely on the experience of other jurisdictions when regulating. The Court has recognized, however, that a legislative body can rely on the experience of other jurisdictions when regulating to protect its citizens from the harmful secondary effects of protected speech. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986). As the Court noted in *Renton*, "The First Amendment does not require a city . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. The States should likewise be able to rely on the evidence gathered by Congress in enacting section 205(e)(2) as justification for their own labeling prohibitions.

2. Equally disturbing is the court of appeals' suggestion that the government's historical experience with the brewing industry can no longer support its alcohol content labeling prohibition. *See* Pet. App. 6a-8a. This reasoning amounts to nothing more than judges substituting their policy preferences for those of the legislature and ignores the lessons of history. It is truly an extraordinary step for the judiciary, given that the legislatures, not the courts, possess the competence to assess the need to regulate the markets.

The court of appeals concluded that strength wars will not recur because, in its view, "brewers in the United States have no intention of increasing alcohol strength, regardless of labeling regulations, because the vast majority of consumers . . . value taste and lower calories—both of which are adversely affected by increased alcohol strength." Pet. App. 8a. Contrary to the reasoning of the court of appeals, consumer preferences can, and do, change. Likewise, brewers' "intentions" are hardly cast in stone. It defies credulity to suggest that if there were an increase in the number of drinkers who preferred "high test" or high alcohol content beers, segments of the brewing industry would not compete, as they did in the years following the repeal of prohibition, for this share of the market. As Santayana wrote, "[W]hen experience is not retained . . . infancy is perpetual. Those who cannot remember the past are condemned to repeat it." 1 George Santayana, *The Life of Reason* 284 (1905). The potential costs of disregarding history are simply too great to allow courts, rather than legislatures, to serve as the proper forums for pleas that circumstances have so changed that legislation no longer serves a valid and substantial governmental interest. *Cf. Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (rejecting First Amendment and due process challenges to civil war era statute limiting attorneys' fees for veteran benefits claims). Institutionally,

legislatures, with their superior resources, are far more competent than courts to assess the validity of claims such as those raised by Coors.

Accordingly, where, as here, Congress's predictive judgment as to future industry behavior is based on past experience, a court must accord substantial deference to it even where the First Amendment is implicated. *See, e.g., Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973) ("The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the [regulated industry] casts its claims under the umbrella of the First Amendment."). Here, both the brewing industry's post-prohibition history and the record evidence "that a number of manufacturers have tried to advertise malt liquor . . . to tout its alcohol strength," Pet. App. 7a, provide more than adequate evidentiary support for Congress' and the States' predictive judgments that labeling prohibitions are necessary to prevent future strength wars.

II. BECAUSE THE SALE AND USE OF ALCOHOLIC BEVERAGES IMPOSES AN IMMENSE TOLL ON SOCIETY, THE TWENTY-FIRST AMENDMENT GRANTS THE STATES BROADER THAN NORMAL AUTHORITY TO PROTECT PUBLIC HEALTH, WELFARE, AND MORALS

1. As Justice Stevens noted in the Court's most recent Twenty-first Amendment case, the States have a substantial interest in "promoting temperance and controlling the distribution of liquor." *North Dakota v. United States*, 495 U.S. 423, 439 (1990) (plurality opinion). Alcohol is a dangerous substance. Quite unlike the sale and use of most other products, the sale and frequent misuse of alcoholic beverages, including beer, imposes an immense toll on society. The

1988 Alcohol Supplement to the National Health Interview Survey "estimated that in 1988 approximately 15.3 million individuals in the United States over age 18 met criteria for a . . . diagnosis of alcohol abuse or dependence or both." U.S. Department of Health and Human Services, *Eighth Special Report to the U.S. Congress on Alcohol and Health* 18 (1993) (*Eighth Special Report*). Likewise, alcohol use by adolescents remains at high levels. A recent survey indicates that 90 percent of high school seniors have tried alcohol with 57 percent reporting use within the previous 30 days and "32 percent of high school seniors report[ing] occasions of heavy drinking (five or more drinks in a row) during the 2 weeks prior to the interview." *Id.* at 21.

Alcohol misuse imposes a substantial burden on the States' criminal justice systems. For example, a "conservative estimate" of the Department of Justice indicates that in 1991, there were 3,176,004 arrests for alcohol related offenses. U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1992* 457 (Table 4.29). These arrests included 1,372,266 for driving under the influence, 677,377 for drunkenness, 590,692 for disorderly conduct, 504,412 for liquor law violations, and 31,257 for vagrancy. *Id.*

Alcohol use remains a significant factor in fatal traffic accidents. Data for the year 1991 show that 38.5% of traffic fatalities occurred in accidents in which a driver was legally intoxicated; another 9.5% of traffic fatalities occurred in accidents in which a driver had ingested alcohol below the legal limit. *Id.* at 355 (Table 3.119). While alcohol related traffic fatalities appear to be declining, in 1991

nearly twenty thousand people lost their lives in this manner.[2] *Id.*

Alcohol use is also a significant factor in other deaths as well. A study of more than 100,000 deaths investigated by North Carolina's medical examiners in the years 1973-83 indicated that a positive blood alcohol content was found in approximately 63 percent of homicide victims and 35 percent of suicide victims. *Eighth Special Report* at 234. Blood alcohol content levels in excess of .10 (the legal level of intoxication in most States) were found in 52 percent of homicide victims and 27 percent of suicide victims. *Id.* Likewise, one study documented that 49 percent of convicted homicide offenders were under the influence of alcohol at the time of their crimes. *Id.* at 246. Another study indicates that 43 percent of fatalities caused by burns and 35 percent of fatalities caused by falls were alcohol related. *Id.* at 237. Studies further suggest that alcohol is a factor in "between 47 percent and 65 percent of adult drownings." *Id.* at 243.

2. As the foregoing demonstrates, while the sale and use of alcoholic beverages is generally legal throughout the United States, the misuse of alcoholic beverages causes substantial public harm. Because of these substantial harms, the sale and advertising of alcoholic beverages does not stand on the same footing as that of other goods and services. Indeed,

[2] Alcohol use is also a factor in many non-fatal crashes. A 1983 report of the National Highway Traffic Safety Administration noted that "[o]ver 650,000 persons per year are injured in alcohol-related crashes." U.S. Department of Transportation, National Highway Traffic Safety Administration, *A Digest of State Alcohol-Highway Safety Related Legislation* iii (1983).

it was because of these widely recognized harms that, in addition to repealing prohibition, the Twenty-first Amendment returned to the States the broad authority to regulate the trade in alcoholic beverages which they had been granted under the Wilson [3] and Webb-Kenyon [4] Acts. *See* David S. Versfelt, Note, *The Effect Of The Twenty-First Amendment On State Authority To Control Intoxicating Liquors*, 75 Colum. L. Rev. 1578, 1579-80 (1975).

Thus, shortly after the Twenty-first Amendment's ratification, this Court stated:

> Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, [a state] may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them . . . . The state may protect her people against evil incident to intoxicants, and may exercise large discretion as to means employed.

Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138-39 (1939) (citations omitted). *See also North Dakota*, 495 U.S. at 432 (plurality opinion) (recognizing that "promoting temperance" and "ensuring orderly market conditions" fall "within the core of the State's power under the Twenty-first Amendment").

More recently, the Court has noted that the Twenty-first Amendment "confer[s] something more than the normal state authority over public health,

[3] 26 Stat. 313 (1890).

[4] 37 Stat. 699 (1913).

welfare, and morals." *California v. LaRue*, 409 U.S. 109, 114 (1972); *see also City of Newport v. Iacobucci*, 479 U.S. 92, 94-95 (1986) (per curiam). To be sure, "[t]he reach of the Twenty-first Amendment is certainly not without limit." *Id.* Thus, the Twenty-first Amendment does not "supersede[] all other provisions of the United States Constitution in the area of liquor regulations." *LaRue*, 409 U.S. at 115; *see also Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Nonetheless, "[t]he States enjoy broad power under . . . the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Accordingly, state liquor control regulations "are supported by a strong presumption of validity and should not be set aside lightly." *North Dakota*, 495 U.S. at 433 (plurality opinion); *see also LaRue*, 409 U.S. at 118-19.

Thus, in *LaRue* this Court overturned the decision of a three judge district court that a state prohibition of live sexual entertainment and films in establishments licensed to sell alcoholic beverages violated the First Amendment. *See id.* Significantly, the district court had held that the regulations did not satisfy the mid-level scrutiny approach for assessing the validity of the regulation of conduct which includes a communicative element. *See id.* at 113-14 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).[5] Nonetheless, this Court held that notwithstanding that the regulated conduct had a communicative element, *O'Brien*'s mid-level scrutiny was too demanding a standard given the State's broader authority to regulate the sale and use of alcoholic beverages. *See* 409 U.S. at 116 ("[W]e do not believe that the state regulatory authority in this case was limited to . . . dealing with the problem it confronted within the limits . . . prescribed for dealing with some forms of communicative conduct in *O'Brien*.").

[5] The means and ends prongs of the *O'Brien* test are similar to those of *Central Hudson*. Under *O'Brien*,

> a government regulation is sufficiently justified if it . . . furthers an important or substantial governmental interest . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. Similarly, the *Central Hudson* test asks:

> . . . whether the asserted governmental interest is substantial. If [so], we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

Instead, the Court applied rational basis review to the regulation, noting that the State's conclusion "that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one." *Id.* at 118; *see also id.* at 116. And in response to the contention that the regulations were not narrowly drawn (because the same results could be achieved by requiring the exclusion of intoxicated patrons), the Court stated that "wide latitude as to choice of means to accomplish a permissible end must be accorded the state agency that is itself the repository of the State's power under the Twenty-first Amendment." *Id.* Because the State's regulations were not unreasonable, *see id.* (citing *Williamson v.*

Lee Optical Co., 348 U.S. 483, 487-88 (1955)), and the Twenty-first Amendment "added [a] presumption in favor of [their] validity," the Court held that the regulations did not violate the First Amendment. *Id.* at 118-19.

LaRue establishes that the immense societal harms imposed by the misuse of alcoholic beverages justify a more deferential standard for reviewing the validity of state alcohol regulations that limit speech. The appropriate standard is not the mid-level scrutiny approach of *Central Hudson* but the less exacting scrutiny of rational basis review. Alcohol content labeling prohibitions meet this standard. As the court of appeals recognized, the record here "contains evidence that consumers who prefer malt liquor do so primarily because of its higher alcohol content and that a number of manufacturers have tried to advertise malt liquor" on the basis of alcohol strength. Pet. App. 7a. Thus, even if Congress and the States cannot rely on the wisdom acquired from observing the brewing industry's experience in the years immediately following the repeal of prohibition, this evidence of "a continuing threat of strength wars"—even if limited to only a segment of the market—establishes that high alcohol content is used in the marketing of malt beverages. Accordingly, this evidence provides a rational basis for concluding that the prohibition of statements of alcohol content on beer labels protects against the recurrence of strength wars.

It is, of course, plausible that if statements of alcohol content were permitted on beer labels, some consumers might use this information to purchase lower strength beers. *See* Pet. App. 37a. It is, however, equally plausible that some consumers would

use such information to purchase higher strength beers as they currently do in the malt liquor market, *see id.* at 7a, and as they actively did in the aftermath of the repeal of prohibition.[6] *See* Office of General Counsel, Federal Alcohol Control Administration, *Legislative History of the Federal Alcohol Administration Act* 67 (1935). Under our constitutional system, the task of determining the need for regulation in the face of these competing views of consumer behavior is the province of legislatures. *Cf. Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981); *Vance v. Bradley*, 440 U.S. 93, 112 (1979); *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 425 (1952). If Coors believes that labeling prohibitions are ill-advised or outdated, it has the right to present its arguments to Congress and the State houses.[7]

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[6] A recent survey indicates that heavy drinking (defined as five or more drinks per occasion on five or more days in the past month) is most prevalent among 18-34 year olds. U.S. Department of Health and Human Services, *Preliminary Estimates From The 1993 National Household Survey On Drug Abuse* 17 (1994). According to this survey, "10.4 percent of 18-25 year olds and 7.3 percent of 26-34 year olds report[ed] heavy drinking." *Id.* Correspondingly, statistics for the year 1989 indicate that while 18-34 year olds comprise only 38.5 percent of licensed drivers, they account for 65.4 percent of arrests for driving under the influence. *Sourcebook of Criminal Justice Statistics—1992* at 456 (Table 4.28).

[7] As the court of appeals noted, Coors did not challenge 27 C.F.R. § 7.29(f) (1993), which prohibits, except where required by state law, labels such as "full strength," "high test," "extra strength," as well as other "similar words or statements likely to be considered as statements of alcoholic content." Pet. App. 7a-8a & n.5. It is, of course, entirely plausible that labels using these words, while descriptive, are nonetheless true statements of a particular beer's alcohol content. Coors' failure to challenge this regulation raises the

III. SECTION 205(e)(2) SHOULD RECEIVE THE PRESUMPTION OF VALIDITY AFFORDED STATE REGULATION UNDER THE TWENTY-FIRST AMENDMENT

As the foregoing demonstrates, state labeling prohibitions enacted pursuant to the Twenty-first Amendment need only satisfy rational basis review and are thus presumptively constitutional. *See LaRue*, 409 U.S. at 113-16. The question remains, however, whether the United States can properly invoke the presumption of validity afforded state regulation to sustain § 205(e)(2).

In *amici*'s view, the correct understanding of the federal government's power under the amendment is that expressed by Justice Black's dissenting opinion in *Hostetter*, *see* 377 U.S. at 334-40, and Justice O'Connor's dissenting opinion (which was joined by the Chief Justice) in *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 352-60 (1987). These opinions explain that Congress expressly rejected a proposed section which would have "granted the Federal Government concurrent authority over some limited aspects of the commerce of liquor." *324 Liquor Corp.*, 479 U.S. at 354 (O'Connor, J., dissenting). As Justice Black (who was a member of the Senate during the debates on the Amendment, *see id.* at 353) wrote:

> [W]hen the Senators agreed to Section 2 they thought they were returning 'absolute control' of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed. Moreover, by rejecting Section 3, they thought they were seeing to it that the Federal Government could not interfere

following questions: (1) Is it constitutional? (2) If so, why is the prohibition against numerical statements of alcohol content any less constitutional?

> with or restrict the State's exercise of the power conferred by the Amendment.

Hostetter, 377 U.S. at 338 (Black, J., dissenting); *see also 324 Liquor Corp.*, 479 U.S. at 354 (O'Connor, J., dissenting) (noting that the "Senate discussions clearly demonstrate an intent to confer on States complete and exclusive control over the commerce of liquor").

Amici recognize, however, that this case does not present an appropriate occasion to revisit the holdings in these and other cases. Accordingly, because section 205(e)(2) merely serves to assist the States in the enforcement of their respective malt beverage labeling laws, it is a permissible exercise of Congress' commerce clause powers as construed by the Court's prior decisions. *See, e.g., Hostetter*, 377 U.S. at 332. As such, section 205(e)(2) should receive the presumption of validity afforded state regulation under the Amendment. *See LaRue*, 409 U.S. at 118-19. Because, as explained above, state labeling prohibitions clearly satisfy rational basis review, section 205(e)(2) is likewise constitutional.[8]

[8] *Amici* respectfully submit that even if the Court concludes that § 205(e)(2) is unconstitutional, it should recognize the broad regulatory powers conferred on the States by the Twenty-first Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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